NO. 86-817

In the Supreme Court of the United States

OCTOBER TERM, 1986

C. T. CARDEN, LEONARD L. LIMES
AND MAGEE DRILLING COMPANY,
Petitioners

VERSUS

ARKOMA ASSOCIATES,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTRIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinions of the Fifth Circuit Court of Appeals in *Arkoma Associates v. C. T. Carden, et al*, ____ F. 2d ____ (5th Cir. 1986) and *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation*, 797 F.2d 238 (5th Cir. 1986) are in conflict with this Court's decision in *Navarro Savings Association v. Lee, et al*, 446 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980).

2. Whether the citizenship of the limited partners of a purported Arizonia limited partnership named plaintiff in a civil case is relevant to a determination of diversity jurisdiction.

3. Whether diversity jurisdiction exists in a civil case where the citizenship of a limited partner of plaintiff limited partnership is the same as that of the defendants.

STATEMENT OF PARTIES

Pursuant to Rule 21.1(b) and Rule 28.1 counsel for petitioners certify that the following named persons are parties to this proceeding:

(1) C. T. Carden;
(2) Leonard L. Limes;
(3) Magee Drilling Company;
(4) Arkoma Associates;
(5) David A. Hepburn;
(6) Eldon Qualls;
(7) Richard K. Ledbetter;
(8) Dudley B. Merkel;
(9) Henry Stram;
(10) Lloyd Canton;
(11) Marie Weaver;
(12) Richard Ayward;
(13) Robert Aylward;
(14) Larry Berberich;
(15) Abhay Bisarya;
(16) Joseph Bowman;
(17) Harvie Chaddock;
(18) Dr. James DiRenna;
(19) Robert Eltonhead;
(20) Dennis Swan;
(21) Dick Gibson;
(22) Dr. John Hagen;
(23) Leo Hallak;
(24) Robert E. Harmon;
(25) Richard L. Harmon;
(26) Earl Hoatson;
(27) Andrew Kaufman;
(28) Dr. Allen Parelman;
(29) Bill Kryger;
(30) LVA Partnership
(31) Dr. Richard Lynch;
(32) McFadin Partnership;
(33) John McKeever;
(34) Percy McKinley;
(35) Nat N. Nast;
(36) Dr. John Pawsat;
(37) Henry Rankin;
(38) David Russell;
(39) Robert Sampson;
(40) Dr. Daniel Scharf;
(41) Robert Schneider;
(42) Lary Schultz;
(43) Keith Schultz;
(44) Elton Shannon;
(45) Ernest Staub;
(46) Frances Swan;
(47) John Sullivan;
()48) Jon Symon;
(49) David Wharton;
(50) Dale Williams;
(51) Dr. Robert Doering; and
(52) Jim Veselich

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

C. T. Carden, Leonard L. Limes
and Magee Drilling Company,

Petitioners

v.

Arkoma Associates, et al,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

Petitioners, C. T. Carden, Leonard L. Limes, and Magee Drilling Company, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this cause.

DECISION TO BE REVIEWED

Petitioners seek review of the opinion of the United States Court of Appeals for the Fifth circuit rendered in *Arkoma Associates v. C. T. Carden, et al* No. 86-9201 reported at ____ F.2d ____ (5th Cir. 1986).

The decision is set forth in the Appendices.

GROUNDS FOR JURISDICTION

The opinion of the Fifth Circuit Court of Appeals in this case was rendered on September 18, 1986 and this petition for a writ of certiorari was filed within ninety days thereafter.

Jurisdiction of the Court is predicated on Title 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

The questions presented by this Petition involve the following constitutional and statutory provisions of the United States:

United States Constitution, Article III Section 2, states:

"The judicial Power shall extend to all Cases, in Law and Equity, . . . between citizens of different States . . ."

28 U.S.C. 1332 (a), states:

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy

exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between - (1) citizens of different States; . . ."

28 U.S.C. 1292 (b), states:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

STATEMENT OF THE CASE

Respondent, Arkoma Associates, a purported Arizona limited partnership, instituted this action against Petitioners, C. T. Carden and Leonard L. Limes, as the guarantors of an equipment lease entered into among the various individuals compresing and in the name of Respondent and Magee Drilling Company. Petitioners, C. T. Carden and Leonard L. Limes, are citizens of Louisiana; Petitioner Magee Drilling Company is a citizen of Texas. One of Respondent's purported limited partners is a citizen of Louisiana. Because of the identity of citizenships among Petitioners and Respondent's Louisiana purported limited

partner, Petitioners moved to dismiss this action for lack of diversity jurisdiction. The Trial Court denied the motion but certified the question to the Fifth Circuit Court of Appeals pursuant to 28 U.S.C. 1292 (b). Petitioners filed a petition for interlocutory appeal which has been denied on the basis of the Fifth Circuit Court of Appeals' decision in the case of *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation,* 797 F. 2d 238 (5th Cir. 1986), a copy of which appears in the appendices.

REASONS FOR GRANTING THE WRIT

1. The decision of the Fifth Circuit Court of Appeals conflicts with the decision of this Court in *Navarro Savings Association v. Lee,* 446 US 458, 100 S.Ct. 1779, 64 L Ed. 2d 425 (S. Ct. 1980).

2. There is a conflict in the decisions of the Fifth and Second Circuit Courts of Appeals on the one hand and the Third, Fourth, and Seventh Circuit Courts of Appeals on the other, relative to the determination of diversity jurisdiction based on a consideration of the citizenship of limited partners: *Lee v. Navarro Savings Association,* 597 F 2d 421 (5th Cir. 1979), *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation,* 797 F. 2d 238 (5th Cir. 1986); *Colonial Realty Corporation v. Bache & Company,* 358 F 2d 178 (2nd Cir. 1966) upholding diversity jurisdiction; and *New York State Teachers Retirement System v. Kalkus,* 764 F 2d 1015 (4th Cir. 1985); *Elston Investment, Ltd. v. David Altman Leasing Corporation,* 731 F 2d 436 (7th Cir. 1984); *Carlsberg Resources Corporation v. Cambria Savings & Loan Association,* 554 F.2d 1254 (3rd Cir. 1977), *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia,* 657 F.2d 29 (3rd Cir. 1981), denying diversity jurisdiction.

ARGUMENT

1. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN *NAVARRO SAVINGS ASSOCIATION V. LEE,* 446 US 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S.Ct. 1980).

The issue before the Fifth Circuit Court of Appeals in the instant case is the same as that considered by this Court in *Navarro Savings Association v. Lee,* 446 U S 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980). Although this Court affirmed the result reached by the Fifth Circuit it did so by rejecting the logic relied on by the Fifth Circuit in this case. The organization at issue in *Navarro,* supra, was a Massachusetts business trust, the trustees of which held legal title to the trust assets while the beneficiaries possessed equitable title. The interest of the beneficiaries was represented by trust certificates transferable as stock in a corporation is transferable, hence the beneficiaries were not at all times the same. The Fifth Circuit sustained diversity jurisdiction in *Navarro* by analogizing the trust to a limited partnership and relying on *Colonial Realty Corporation v. Bache & Company,* 358 F 2d 178 (2nd Cir. 1966) which held that in a diversity case involving a limited partnership the citizenship of the general partners alone need be considered. In *Navarro* this Court granted certiorari, affirmed the result reached by the Fifth Circuit, but repudiated its reasoning, holding:

(page 1782)

> "Although corporations suing in diversity long have been "deemed"citizens, see n. 7, supra, unincorporated associations remain mere collections

> of individuals. When the 'persons composing such association' sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court. *Great Southern Fire Proof Hotel Co. v. Jones,* 177 U.S. 449, 456, 20 S. Ct. 690, 693, 44 L. Ed. 842 (1900) (limited partnership association); see *Steelworkers v. Bouligny, Inc.* 382 U.S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217 (1965) (labor union); *Chapman v. Barney,* 129 U.S. 677, 9 S. Ct. 426, 32 L. Ed. 800 (1889) (joint stock company) ...
>
> But this case involves neither an association nor a corporation. Fidelity is an express trust, and the question is whether its trustees are real parties to this controversy for purposes of a federal court's diversity jurisdiction ...
>
> Federal Rule of Civil Procedure 17(a) now provides that such trustees are real parties in interest for procedural purposes."

It is clear from these quotations that this Court rejects the principle that only the citizenship of the general partners of a limited partnership determines diversity jurisdiction. *Navarro's* result was sustained because the organization therein at issue was *not* a limited partnership but a business trust.

Federal Rules of Civil Procedure, Rule 17 (a), cited by this Court in *Navarro,* in pertinent part provides:

> "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an

> express trust ... may sue in his own name without joining with him the party for whose benefit the action is brought ..."

It is noteworthy that neither the general partner of a limited partnership nor any partner is mentioned by *Rule 17 (a)* as a real party at interest. Additionally there is no division between legal and equitable ownership in a limited partnership as there is in a trust. The four general partners of Respondent own one percent of the partnership while the forty-eight limited partners own ninety-nine percent or .0206 each which interest is substantially the same as the .025 interest owned by each of the general partners.

This Court's holding in *Navarro, supra,* mandates the presence of "the *real* parties to this controversy" for purposes of determining diversity.

How can it be said that such a limited partner's citizenship should not be considered, or that a general partner is a real party in interest and a limited partner is not?

2. THE DECISIONS OF THE FIFTH AND SECOND CIRCUIT COURTS OF APPEALS ON THE ONE HAND AND THOSE OF THE THIRD, FOURTH AND SEVENTH CIRCUIT COURTS OF APPEALS ON THE OTHER, CONFLICT ON DETERMINATION OF DIVERSITY JURISDICTION IN CASES INVOLVING LIMITED PARTNERSHIPS.

The Fifth Circuit in *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation,* 797 F. 2d 238 (5th Cir. 1986), and the Second Circuit in *Colonial Realty Corporation v. Bache & Company,* 358 F 2d 178 (2nd Cir. 1966) have held that only the citizenship of the general

partners of a limited partnership need be considered in determining diversity jurisdiction in cases involving limited partnerships.

The Fifth Circuit relying on *Navarro*, in *Mesa* held:

"Since we find it unnecessary to consider the citizenship of limited partners, we conclude that it need not be ascertained.

We apply the Supreme Court's analysis in *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980), affirming a decision of this court, to this case ...

We find this reasoning equally appropriate here. A limited partnership is also neither corporation nor association but a similar hybrid. Here, as in *Navarro*, the power to control and manage assets and litigation rests exclusively with one class of members, the general partners. We think that where it is possible to identify clearly a class of members as the real party to a controversy, the citizenship of that class alone is relevant for diversity purposes."

The Second Circuit in *Colonial* held:

"The argument is that a limited partner of Bache & Co. is a citizen of Delaware and that diversity is thereby destroyed under the venerable doctrine of *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435 (1806). The district judge recognized that the citizenship of a limited partnership was not sufficiently made out for diversity purposes by alleging the state of its organization, even though state law permitted the partnership to sue or be sued in the firm name...

> But He correctly held that where, as here, there was diversity between the plaintiff and all the general partners of the defendant, identity of citizenship
> between the plaintiff and a limited partner was not fatal . . ."

To the contrary the Third Circuit in *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia*, 657 F. 2d 29 (3rd Cir. 1981), the Fourth Circuit in *New York State Teachers Retirement System v. Kalkus*, 764 F. 2d 1015 (4th Cir. 1985) and the Seventh Circuit in *Elston Investment, Ltd. v. David Altman Leasing Corporation*, 731 F 2d 436 (7th Cir. 1984) have held that the citizenship of both the general and limited partners must be considered in determining diversity jurisdiction.

The Third Circuit in *Trent* held:

> "Analysis of the diversity issue must begin with the undisputed proposition that a limited partnership is an unincorporated association whose citizenship is deemed to be that of the 'persons composing such association'. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456, 20 S.Ct. 690, 698, 44 L.Ed. 842 (1900). Applying that holding to the precise issue raised here, this court held that the citizenship of a limited partner will defeat diversity if it is the same as one of the parties on the opposing side. *Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n*, 554 F. 2d 1254 (3d Cir. 1977).
>
> First Federal urges us to abandon the holding of *Carlsberg Resources* on the ground that the subsequent decision of the Supreme Court in *Navarro Savings Ass'n. v. Lee*, 446 U.S. 458, 100

S.Ct. 1779, 64 L.Ed. 2d 425 (1980), requires that we apply a 'real party in interest' test in determining Trent's citizenship. It argues that under the analysis in *Navarro*, only the general partners are such parties here. We do not read *Navarro* to require us to depart from the precedent of *Carlsberg Resources.*

The Court cited limited partnerships as one of the class of unincorporated associations which are to be distinguished from express trusts, and referred approvingly to the holding of *Great Southern Fire Proof Hotel Co. v. Jones,* supra. as governing limited partnerships.

We see nothing in the Court's opinion to support First Federal's position that the *Navarro* holding compels applicataion of a 'real party in interest' test to limited partnership."

The Fourth Circuit in *New York Teachers* finding that deversity jurisdiction did not exist held:

"Teachers is a public retirement system created and existing by virtue of Article 11 of the Education Law of the State of New York and having the powers and privileges of a corporation pursuant to Section 502 of that statute. Teachers' principal place of business is in Albany, New York . . .

Except for PTA, all of defendants/appellants are citizens of states other than New York. PTA is a limited partnership established under the laws of Virginia. Its sole general partner is Kalkus, a resident and citzen of the State of New Jersey. Several dozen limited partners are residents of numerous states, including New York . . .

> The district court concluded that it had jurisdiction over the action pursuant to 28 U.S.C. 1332(a). It ruled that the citizenship of a limited partnership is determined by the citizenship of all of its general partners, without regard to the citizenship of any limited partners, and that, therefore, all of the defendants, for jurisdictional purposes, were citizens of states other than New York.
>
> Defendants appeal.
>
> On appeal, the primary contention made by defendants/appellants is that the district court lacked subject-matter jurisdiction over this action. They maintain that all of the partners of PTA, both general and limited, must be considered in determining whether complete diversity exists. We agree and consequently, do not reach the other contentions raised by appellants."

The Seventh Circuit in *Elston*, finding that diversity jurisdiction did not exist, held:

> "The Supreme Court has directed federal courts, when determining whether complete diversity of citizenship exists, to 'disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.' *Navarro Savings Ass'n v. Lee*, . . .
>
> When the 'persons composing such association' sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court . . .

> ThermaSol bases its argument for an exception to the rule on an analogy between a limited partnership and an express business trust. ThermaSol points out that general partners, like a trustee, manage the assets of a limited partnership and control litigation involving the partnership . . .
>
> In *Navarro,* the Supreme Court explicitly rejected the very analogy upon which ThermaSol now relies . . .
>
> In addition, we reject the argument that limited partners are not 'real parties' to controversies involving the partnership because they have no capacity to sue on behalf of the partnership."

CONCLUSION

The decision of the Fifth Circuit Court of Appeals in this case conflicts with that of this Court in *Navarro Savings Association v. Lee,* supra.

The decisions of the Fifth and Second Circuit Courts of Appeals conflict with those of the Third, Fourth and Seventh Circuit Courts of Appeals with respect to the necessity for considering the citizenship of limited partners when determining the existence of diversity jurisdiction.

Petitioners pray that a *writ of certiorari* be issued by this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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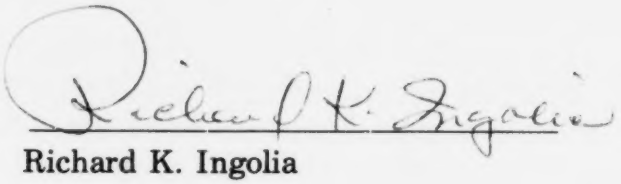
By: Richard K. Ingolia
Richard K. Ingolia

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been sent to each opposing counsel of record by depositing the same in the U.S. Mail, postage prepaid this 12th day of November, 1986.

I further certify that all parties required to be served have been served.



Richard K. Ingolia

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arkoma

APPENDIX "A"

MINUTE ENTRY
McMAMARA, J.
April 23, 1986

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	No. 85-2295
C. TOM CARDEN, ET AL	*	SECTION "D" (4)

Before the court is the Motion of Defendants, C. Tom Carden and Leonard L. Limes, to Dismiss Plaintiff's action for Lack of Jurisdiction. The Motion was heard during a Pre-Trial Conference held in this matter on February 26, 1986. Counsel were ultimately given until April 4, 1986 to submit additional memoranda regarding the jurisdictional issue, with the matter being taken under advisement as of April 4, 1986.

Having considered the memoranda and argument of counsel and the applicable law, the court makes the following findings. There are essentially two arguments presented by Defendants in support of their Motion to Dismiss. First, Defendants argue that because Plaintiff, Arkoma Associates, is a general partnership rather than a limited partnership, in order to obtain diversity jurisdiction the citizenship of each and every one of the partners

must be diverse from the citizenship of each Defendant. *Great Southern Fire Proof Hotel Co., v. Jones*, 177 U.S. 449, 456, 20 S.Ct. 690, 693, 44 L.Ed. 842, 845 (1900). Since one of the partners is a citizen of the same state as Defendants[1] diversity does not exist; therefore, the suit should be dismissed for lack of jurisdiction.

The court is unpersuaded by this argument. Pursuant to Section 29-302B of the Arizona Revised Statutes, the law which was in effect when Arkoma Associates was formed, a limited partnership is valid if there has been "substantial compliance in good faith" with Section 29-302A of the Arizona Revised Statutes. While Plaintiff did not comply with all the requirements of Section 29-302A[2], the court finds that the Plaintiff in good faith,

---

[1] Both of the Defendants are citizens of Louisiana and the parties have stipulated to the fact that one of Plaintiff's alleged limited partners is also a citizen of Louisiana.

[2] Section 29-302A of the Arizona Revised Statutes states, in pertinent part:

> A. Two or more persons desiring to form a limited partnership shall:
>
> 1. Sign and acknowledge a certificate, which shall state:
>
> . . .
>
> (d) The name and place of residence of each member, general *and limited partners being respectively designated*. . . .
>
> 2. File for record the ceertificate in the office of the county recorder of the county in which the principal place of business is situated. [emphasis provided.]

Plaintiff failed to comply with this portion of A.R.S. § 29-302A in that Plaintiff did not state the name and place of residence of each of its limited partners in its original limited partnership certificate which was filed on September 1, 1981 with the recorder's office in Maricopa County, the county where Plaintiff's principal place of business is located.

substantially complied with the provisions of the statute, and therefore is a valid limited partnership under Arizona law.

Second, Defendants argue that even if Plaintiff is a limited partnership, diversity jurisdiction still does not exist since one must look to the citizenship of both general and limited partners for the purpose of determining whether or not complete diversity is present. If this is the case, then diversity jurisdiction is not present in this action since, as stated earlier, one of the limited partners is a citizen of the same state as Defendants. *See supra* n. 1.

While I am aware that the Third and Seventh Circuits support Defendants' position[3], I feel bound to uphold jurisdiction in this instance for the following reason. In *Lee v. Navarro Savings Association*, 597 F. 2d 421 (5th Cir. 1979), the Fifth Circuit indirectly addressed the issue concerning whether or not the citizenship of limited partners is of any significance in determining if a federal court's diversity jurisdiction may be invoked. While *Lee* dealt with a business trust rather than a limited partnership, the court, by analogizing a business trust to a limited partnership, gave its view regarding the importance of a limited partner's citizenship for diversity purposes. The court reasoned:

> The trust here is analogous to a limited partnership and the citizenship of its beneficiary shareholders should not be counted in determining the existence of diversity jurisdiction. The

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[3] *See Carlsberg Resources Corp. v. Cambria Savings and Loan Ass'n.*, 554 F.2d 1254 (3rd Cir. 1977), and *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436 (7th Cir. 1984), for the views of the Third and Seventh Circuits, respectively, on this particular diversity question.

> citizenship of the shareholder should be disregarded in the same manner as was done by the Second Circuit in *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 184 (2nd Cir. 1966). *cert. denied*, 385 U.S. 817 (1966), where the court held that 'a suit brought against a New York [limited] partnership must thus be considered to be against the general partners only and identity of citizenship between a limited partner and the plaintiff does not destroy diversity.' [footnote omitted.] *Lee* at 425.

In light of this language and in the absence of any Supreme Court authority to the contrary[4], I am compelled by Fifth Circuit precedent to hold that diversity jurisdiction does exist in this matter; accordingly Defendants' Motion to Dismiss Plaintiff's suit for lack of jurisdiction is DENIED. However, because I find that my order denying Defendant's Motion to Dismiss involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court hereby certifies this matter for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b).

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[4] The Supreme Court reviewed the *Lee* opinion in *Navarro Savings Association v. Lee*, 446 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). While the Supreme Court ultimately affirmed the Fifth Circuit's holding in *Lee*, Defendants argue that in doing so, the Court rejected the appellate court's reasoning regarding whether or not the citizenship of limited partners should be considered in determining if a federal court has diversity jurisdiction over a particular action. However, I am unpersuaded by Defendants' argument and note the dissent of Justice Blackmun who "read[s] the court's opinion in *[Navarro]* as expressing no view on the diversity or citizenship issue that is presented when one of the parties is a limited partnership." *id.* at 1789 n. 6 (Blackmun, J. dissenting).

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-9201

USDC -CA 85-2295 D

ARKOMA ASSOCIATES,

Plaintiff-Respondent,

versus

C. TOM CARDEN and LEONARD L. LIMES,

Defendants-Petitioners.

. . . . . .

Petition for Leave to Appeal an Interlocutory Order

. . . . . .

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.

BY THE COURT:

On June 12, 1986, this Court directed that the petition of C. Tom Carden and Leonard L. Limes for leave to appeal an interlocutory order denying their motion to dismiss Arkoma Associates' action for lack of diversity jurisdiction be held in abeyance pending this Court's decision in 86-3128, *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation.* On August 18, 1986, this Court decided *Mesa Operating Limited Partnership,* holding that the citizenship of a limited partnership is determined by the citizenship of the general partners.

____ F.2d ____ (5th Cir., August 18, 1986, no. 86-3128, slip p. 9121). Based on that decision, we conclude that the petitioners have failed to establish that an appeal of the interlocutory order would materially advance the ultimate termination of the litigation as required by 28 U.S.C. §1292(b). Accordingly, IT IS ORDERED that the petition is DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MESA OPERATING LIMITED
PARTNERSHIP,
Plaintiff-Appellee,

v.

No. 86-3128
OPINION

LOUISIANA INTRA STATE GAS
CORPORATION,
Defendant-Appellant.

Filed August 18, 1986

Before: Will Garwood and Edith H. Jones, Circuit Judges,
and
Hubert L. Will*, Senior District Judge.

Opinion by Senior District Judge Hubert L. Will

Appeal from the United States District Court
for the Middle District of Louisiana
John V. Parker, Chief District Judge, Presiding

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*Senior District Judge of the Northern District of Illinois, sitting by designation.

SUMMARY

Arbitration/Jurisdiction

Appeal from a decision granting a limited partnership's petition to compel arbitration. Affirmed.

Mesa Operating Limited Partnership (Mesa) contracted to sell royalty gas to Louisiana Intrastate Gas Corp. (LIG). The contract contained an arbitration provision. After satisfactory performance for two years, LIG ceased payments due under the contract. Mesa attempted to invoke the arbitration procedure, but LIG refused to name an arbitrator, contending (a) that the contract was void *ab initio* because Mesa had not complied with Louisiana statutory procedure in acquiring the right to sell the gas and (b) that validity *ab initio* of a contract is not arbitrable under Louisiana law. Mesa then filed a petition to compel arbitration, which LIG moved to dismiss on grounds of lack of federal jurisdiction and inapplicablity of the Federal Arbitration Act (FAA). The district court granted Mesa's petition.

[1] Although LIG contends that the citizenship of the limited partners of a limited partnership must be alleged and considered in determining diversity jurisdiction, [2] where it is possible to identify clearly a class of members as the real party to a controversy, the citizenship of that class alone is relevant for diversity purposes. [3] In a case involving a business trust, the Supreme Court has held that the trustees rather than the beneficiaries were the real parties to the controversy because they held title to the

assets, managed the assets, and controlled any litigation involving the trust. Similarly, in the limited partnership here, the general partners, and they alone as against the limited partners, control and manage the assets, conduct all business, and control all litigation. [4] Consequently, only the citizenship of Mesa's general partners is relevant to the determination of diversity jurisdiction. [5] As to the applicability of the FAA, LIG argues that it is inapplicable because its contract with Mesa did not involve "commerce" since the gas did not cross state lines. [6] However, citizens of different states engaged in the performance of contractual operations in one of those states are engaged in a contract involving commerce under the FAA. Such a contract necessitates interstate travel of both personnel and payments. Here, the general partners of Mesa are citizens of Texas operating in Louisiana, which qualifies their operations as "involving commerce." [7] Finally, LIG contends that Mesa's failure to comply with sale approval provisions of Louisiana law made its contract void *ab initio*, and that therefore the dispute was not arbitrable since it did not arise under the contract. [8] However, LIG has not argued that the agreement to arbitrate is invalid separately from the entire contract, and [9] to allow the tactic attempted here would be to undermine the long-standing policy of liberal and vigorous enforcement of arbitration clauses.

OPINION

HUBERT L. WILL, Senior District Judge:

Opposing parties in this case contracted on June 15, 1981 for fifteen years. Mesa Operating Limited Partnership (Mesa) was to sell and Louisiana Intrastate Gas Corp. (LIG) was to buy royalty gas belonging to the State of

Louisiana for which Mesa served as agent. The contract contained an arbitration provision under which the parties were to arbitrate "any controversy between the parties...arising under this Contract." § 8.1. The contract was performed satisfactorily to both sides for about two years. Mesa alleges that some time before July, 1984 LIG ceased payments due under the take-or-pay provision of the contract. Mesa then attempted to invoke the arbitration procedure by letter of December 23, 1985. LIG refused to name an arbitrator, taking the positions (a) that Mesa had not complied with Louisiana statutory procedure in acquiring the right to sell the gas belonging to the State, rendering the contract void *ab initio,* and (b) that validity *ab initio* of a contract is not arbitrable under the applicable Louisiana law.

Mesa filed a petition to compel arbitration in the District Court for the Middle District of Louisiana under section 4 of the Federal Arbitration Act (FAA), 9 U.S.C. §§1-14, on January 14, 1986. LIG moved to dismiss on grounds of lack of federal jurisdiction under Title 28 and inapplicability of the FAA. The district court granted Mesa's petition and LIG has appealed. We affirm.

1. *Diversity Jurisdiction*

[1] Under the FAA, federal jurisdiction is available only if otherwise available through some independent source such as 28 U.S.C. § 1331 or § 1332. 9 U.S.C. § 4. Here diversity is the alleged basis of jurisdiction, LIG contends that the citizenship of the limited partners of a limited partnership must be alleged and considered in determining diversity jurisdiction. Since we find it unnecessary to consider the citizenship of limited partners,

we conclude that it need not be ascertained.

We apply the Supreme Court's analysis in *Navarro Savings Ass'n v. Lee,* 446 U.S. 458 (1980), affirming a decision of this court, to this case. In *Navarro,* the Court had to decide whether to look to the citizenship of the beneficiaries of a business trust or only to that of the trustees. The Court characterized the business trust as "neither an association nor a corporation," *id,* at 462, although having some attributes of both. *Id.* The Court held the trust's resemblance to other forms of business enterprise irrelevant to the determination of whose citizenship determined diversity jurisdiction. *Id.* at 465. The Court identified the correct analysis as focusing on the "real parties to the controversy." *Id.* at 462. These parties the Court defined as those with the power to own, manage and control the assets of the trust and to control its litigation. *Id.* at 465.

[2] We find this reasoning equally appropriate here. A limited partnership is also neither corporation nor association but a similar hybrid. Here, as in *Navarro,* the power to control and manage assets and litigation rests exclusively with one class of members, the general partners. We think that where it is possible to identify clearly a class of members as the real party to a controversy, the citizenship of that class alone is relevant for diversity purposes.

Judge Friendly of the Second Circuit reached a similar result in *Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178, 183-84 (2d Cir.), *cert, denied,*385 U.S. 817 (1966). The court there found that, under the state statute creating limited partnerships, a limited partner was "not a proper party to proceedings by or against the partnership..."

unless the suit involved insolvency of the partnership or rights of the limited partners against the partnership. 358 F.2d at 183-84. Although this constitutes a parallel route to the same result, the concept of two distinct classes of members one of which has no place in the dispute is essentially the same reasoning under a different label. Courts in the Second Circuit have continued to follow that dicision *Westville Holdings v. American Petroleum Partners,* 592 F.Supp. 44 (S.D.N.Y. 1984).

A number of other circuits disagree, *Carlsberg Resources Corp. v. Cambria Sav. & Loan,* 554 F.2d 1254 (3d Cir. 1977); *Elston Inv. Ltd. v. David Altman Leasing Corp.,* 731 F.2d 436 (7th Cir. 1984); *New York State Teachers Retirement System v. Kalkus,* 764 F.2d 1015 (4th Cir. 1985). The leading case, *Carlsberg Resources,* opposing the holding of *Colonial Realty,* looked to traditional treatment of unincorporated associations. The court in *Carlsberg* cited two turn-of-the-century cases, *Chapman v. Barney,*129 U.S. 677 (1889) and *Great Southern Fire Proof Hotel Co. v. Jones,* 177 U.S. 449 (1900). *Chapman* involved a joint stock company whose president had capacity to sue in the name of the partnership; there is no other indication that he had any other powers different from the other members. *Great Southern* involved a "limited partnership" with no general partner. In *Navarro,* the Court characterized these two cases as "early cases" in which a voluntary unincorporated association remains a "mere collection of individuals" who "sue in their collective name."446 U.S. at 461. Associations thus described are clearly quite different from a limited partnership with two separate and distinct classes of members, one of which enjoys exclusive ownership of assets and control over all legal and business decisions. We do not regard *Navarro* as having endorsed

application of the holdings in these early cases to the modern limited partnership as *Carlsberg* and the cases following *Carlsberg* have concluded.

The three circuits that have looked to the citizenship of limited partners for diversity purposes have also relied on *United Steelworkers v. Bouligny, Inc.*, 382 U.S. 145 (1965), as drawing a hard line on expansion of diversity jurisdiction. But the question in *Bouligny* was whether a labor union could itself be treated as a separate citizen for diversity purposes. The case did not involve a choice as to whether two separate classes of members could be differentiated as does this case and as did *Navarro.* As we said in *Lee v. Navarro Savings Ass'n,* 597 F.2d 421 (5th Cir. 1979), *aff'd,* 446 U.S. 458 (1980), we believe *Bouligny* applies only to the situation where an unincorporated association seeks to establish jurisdiction as an entity.

This is consistent with the holding in *Navarro,* where the Supreme Court found *Bouligny* inapposite. The Court cited *Bouligny* only to exemplify the difference in outcome for diversity purposes between a real party in interest test and the Court's real party to the controversy test. 446 U.S. at 462-63 n.9. The union in *Bouligny* did not meet the tests for real party to the controversy. Like the early cases, in *Bouligny* there was no class with exclusive control based on contract (or statute) setting forth permanent rights, powers and obligations as granted to the trustees in *Navarro* and to the general partners here. Thus, district courts in New York have encountered no difficulty in applying *Colonial Realty* to limited partnerships, *Westville Holdings, supra,* while applying *Bouligny* to unions, *United States Postal Service v. American Postal Workers Union,* 564 F.Suppp. 545 (S.D.N.Y. 1983).

The reasoning of the other circuits comes down to a disinclination to expand diversity jurisdiction without congressional authorization. We find that reason irrelevant to our decision. If determination of diversity jurisdiction rests on the test the Supreme Court developed in *Navarro*, diversity jurisdiction extends only to the precise parties to whom it should extend: that is, the real parties to the controversy. While this may arguably create diversity expansion, it is more semantics than principle. An attempt to create a new type of citizen would, of course, expand jurisdiction. Here we are dealing only with which already extant citizens are involved in the case; the issue here is merely a necessary interpretation of existing law.

In *Lee*, we drew an analogy between a business trust and a limited partnership. "The trust here is analogous to a limited partnership, and the citizenship of its beneficiary shareholders should not be counted in determining the existence of diversity jurisdiction." 597 F.2d at 425. We relied on the Declaration of Trust in that case to determine that the trustees had exclusive control. The exclusive power to manage and control the trust and to control its litigation was precisely the point on which the Supreme Court affirmed. These powers were those which conferred the status of real parties to the controversy on the trustees. Despite the fact that the Court retitled our test from "real parties in interest" to "real parties to the controversy," the Court affirmed our test as we applied it. We reject the argument, made in *Elston Inv.*, *Kalkus*, and *Trent Realty Assoc. v. First Fed. Sav. & Loan*, 657 F.2d 29 (3d Cir. 1981), that the Court's characterization of a trust as neither corporation nor association rejected analogous use of this test for limited partnerships.

Before the *Navarro* decision, lower courts had frequently held citizenship of the beneficiaries of a business trust relevant to determination of diversity jurisdiction.*Belleview Apts. v. Realtwy ReFund [sic] Trust,* 602 F.2d 668 (4th Cir. 1979); *Heck v. A.P. Ross Enterprises, Inc.,* 414 F. Supp. 971 (N.D.III. 1976); *Chase Manhattan Mortg. & Realty Trust v. Pendley,* 405 F. Supp. 593 (D.Ga. 1975).*Navarro* has clearly overruled these cases which relied on analogizing a business trust to an unincorporated association. We acknowledge that *Navarro* was expressly limited to trusts. But we see no reason not to apply its reasoning to a situation it equally fits.

[3] The correct analogy to be drawn is not between the types of business enterprise involved, but between application of the Court's test in *Navarro* to another enterprise. The Court held the trustees the real parties to the controversy because they, and they alone among the membership, held title to the assets, managed the assets, and controlled any litigation involving the trust. Similarly, in the limited partnership here, the general partners, and they alone as against the limited partners, control and manage assets, conduct all business and control all litigation. In the absence of specific direction from the Supreme Court, we think the proper course is to apply the analysis made by the Court in *Navarro* to the facts before us.

[4] Mesa's Amended and Restated Agreement of Limited Partnership, Plaintiff's exhibit 5, dated September 5, 1985, provides that the general partners have full authority without limitation to conduct all business; expend or encumber all assets; negotiate, enter into, execute and perform all contracts and conveyances; and control all matters affecting rights and obligations of the partnership,

"including the conduct of litigation." § 7.2. The limited partner cannot remove the general partners, § 13.1. The limited partner can dissolve the partnership only after withdrawal of a general partner or an event which removes him. § 14.1. The limited partner can amend the agreement only with consent of the general partners where such amendment has any legal effect on the general partners; the general partners may amend without agreement of the limited partner in a number of ways. Art. XV(a), (b), (c).[1] We conclude on the basis of this partnership agreement (1) that the general partners of Mesa have exclusive power to manage and control all assets, conduct all business, and control all litigation; (2) that the general partners are the real parties to the controversy; and (3) that only their

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[1] Under most state limited partnership acts and the Uniform Limited Partnership Act, limited partners have more power than the limited partner in this case does. Under Delaware law, for example, the limited partner is excluded from participation in control of the business. But the following powers are defined as not constituting participation: consulting, advising; being employed by or hired as a contractor or agent by the general partner; and voting on amendments to the partnership agreement, dissolution of the partnership, removal of the general partner, transfer of a material portion of the assets, incurrence of material indebtedness, and approving matters related to the business. 6 Del.C. § 17-303. Furthermore, the limited partner may sue in the name of the partnership if the general partner refuses or would refuse to do so. § 17-1001. Thus the partnership here, if formed under Delaware law—as is the case—and with no further restrictions on powers of the limited partner, might not meet the Court's test for the clear division between classes of partners on which this decision is based. We express no opinion as to whether a limited partnership agreement which granted powers to limited partners as broad as the Delaware statute permits would require the limited partners to be considered for diversity jurisdiction.

citizenship is relevant to the determination of diversity jurisdiction.[2]

II. Applicability of the Federal Arbitration Act

[5] The FAA provides that a written provision in a "contract evidencing a transaction involving commerce" shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. LIG alleges that the contract between these parties did not involve commerce in that the gas did not cross state lines. LIG has submitted an affidavit containing uncontroverted testimony that the gas under the contract is produced in Louisiana waters by Mesa, transported and sold to LIG in Louisiana, and sold by LIG to Louisiana customers only. Whether or not these customers in turn sell interstate is not clear. In LIG's view, this prevents the contract from "involving commerce."

Mesa has also submitted an affidavit which contains further uncontroverted facts: under the contract and during the course of its performance, the general partners of Mesa were recognized as citizens of Texas operating in Louisiana; they sent personnel from Texas to Louisiana and received all communications related to the contract and all payments under the contract in Texas.

[6] Citizens of different states engaged in performance of contractual operations in one of those states are engaged in a contract involving commerce under the FAA.

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[2] The Court suggested in *Navarro* that diversity jurisdiction should be a question capable of a simple and immediate answer. Where jurisdiction depends on citizenship of general partners and a showing that they have exclusive management and control of assets and litigation, determination of citizenship would be both faster and easier than a process of matching up long lists of members whose addresses may not even be correctly carried on the partnership's books as of the date of filing.

Such a contract necessitates interstate travel of both personnel and payments. Commerce under the FAA is not limited to interstate shipment of goods, as LIG argues, but includes all contracts "relating to interstate commerce." *Prima Paint v. Flood & Conklin Mfg. Co.* 388 U.S. 395, 401 n.7 (1967), quoting H.R. Rep. No. 96, 68th Congress, 1st Sess. 1 (1924). Where citizens of one state conducted all of their business in another state, the court found a contract involving interstate commerce under the FAA. *Snyder v. Smith,* 736 F.2d 409 (7th Cir.), *cert. denied,* 105 S.Ct. 513 (1984). Where all business under the contract took place in one state and corporations in that state were formed by the parties for the purpose, the fact that money-raising activity took place in another state brought the contract under the FAA. *Masthead MAC Drilling Corp. v. Fleck,* 549 F. Supp. 854 (S.D.N.Y. 1982). Mesa similarly crosses lines in order to engage in operations under the contract. Mesa also has raised money for the project outside Louisiana. Thus we find that this contract involves commerce under the FAA and the federal law of arbitrability applies to the arbitration provision in this contract.

The fact that the parties intended arbitration under Louisiana law does not affect the question of arbitrability. As we said in *Huber, Hunt & Nichols v. Architectural Stone Co.,* 625 F.2d 22 (5th Cir. 1980), the existence of commerce under the FAA is dispositive with respect to the law which governs arbitrability even where the parties contemplated state law governance. *Accord Commonwealth Edison Co. v. Gulf Oil Corp.,* 541 F.2d 1263 (7th Cir. 1976); *Collins Radio Co. v. Ex-Cell-O Corp.,* 467 F.2d 995 (8th Cir. 1972); *Coenen v. R. W. Pressprich & Co.,* 453 F.2d 1209 (2nd Cir.), *cert. denied,* 406 U.S. 949 (1972). Furthermore, sufficient legal authority was available to the parties prior

to their contract to put them on notice that the FAA would govern arbitrability of issues arising under the contract.

The affidavits conflict on whether LIG uses interstate pipelines to transport the gas under the contract. But where Congress has exercised its authority under the Commerce Clause to regulate *intrastate* shipments of gas, 15 U.S.C. § 3371 (a) & (b), we may presume the commerce is under regulation by Congress. Where the price established in the contract is the amount established as the maximum lawful price by the Natural Gas Policy Act of 1978, § 6.1, we may presume the commerce is under regulation by an agency created by Congress. Unless commerce under the FAA is a narrower term, as suggested by Justice Black's dissent in *Prima Paint,* 338 U.S. at 409-10, then Congress' regulation of the price and shipping arrangements involved in this contract lead to a finding of commerce under the FAA.

III. Application of the federal law of arbitrability to the issue of validity ab initio.

[7] LIG alleges that the state Mineral Board, from which Mesa leased the produciton site, and Mesa had together failed to comply with La. Rev. Stat. #30:142 (West 1974), which required that the contract to sell the state's gas be approved by certain state officials or that public bid procedures be followed. LIG contends that this failure made the contract between LIG and Mesa void as never having been entered into. LIG further argues that this issue could not, therefore, have arisen under the contract and was, therefore, not arbitrable.

[8] The Gas Contract states that the parties agree to arbitrate "any controversy between the parties ... arising

under this Contract." § 8.1 This is the same language held broad enough to encompass—as an arbitrable issue—an allegation of fraudulent inducement against the entire contract in *Prima Paint,* 388 U.S. at 398. *Prima Paint* held that, under section 4 of the FAA, the "making" of an agreement to arbitrate was not called into question by the allegation that the entire contract was fraudulently induced. Therefore, the Court concluded, the fraudelent inducement question was properly resolved by an arbitrator rather than a court. *Id.* at 403-04. Similarly, in this case, LIG has not argued that the agreement to arbitrate is invalid separately from the entire contract. Thus the arbitration provision remains separate and enforceable under *Prima Paint.*

This case is very close factually to *Prima Paint.* There, the defendant had represented itself as able to perform under the contract though in fact it was unable to do so. Here, Mesa warranted title to the gas and offered indemnification for adverse claims to title. § 7.1. Even if LIG's allegation is correct, the worst result of the defect in the contract would be Mesa's inability to perform. This was precisely the factural situation referred to arbitration in *Prima Paint.*

We find the issue raised by LIG separable from the arbitration agreement on a further ground. A regulatory agency has its own duty to enforce its own procedures; it is free to pursue its own remedies and is not bound by the arbitration results of parties to a contact involving those regulations. *Gulf Oil Corp. v. Federal Power Comm'n,* 563 F.2d 588 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1062 (1978). There is no reason, therefore, for the parties' arbitration to be hindered by the duties or claims of the regulatory

agency. Under the arbitration provision, the arbitrators must be qualified by education and experience to deal with the disputed issue. § 8.3 Since the validity issue in dispute here involves calims of the state, the parties should select arbitrators who can pass on that question.

[9] The legislative purpose of the FAA, consistently interpreted as such by the Supreme Court, is to enforce arbitration clauses as liberally and rigorously as possible. "Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts." *Southland Corp. v. Keating,* 465 U.S. 1, 7 (1984); *see also Graphic Communications Union v. Chicago Tribune Co.,* 779 F.2d 13 (7th Cir. 1985), in which the court vigorously criticized resort to courts to delay clearly contracted arbitration. To allow the tactic attempted here—irrelevant both to the freely agreed arbitration provision and to the true issue between the parties—would be to undermine the long-standing policy of liberal and vigorous enforcement of arbitration clauses and to permit such clauses to be used as vehicles for delaying the resolution of disputes rather than expediting it. This would inevitably lead to abandonment of their use, a result undesirable and inconsistent with current efforts to broaden means of dispute resolution.

Affirmed.

APPENDIX "D"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
versus	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D"
	*	Mag. Div. 4

* *

STIPULATION

IT IS HEREBY agreed and stipulated by and among Arkoma Associates, plaintiff, C.T.Carden and Leonard L. Limes, Defendants, each through undersigned counsel:

1) Arkoma Associates is alleged to be a limited partnership under the law of the State of Arizona.

2) One of the alleged limited partners is a citizen of Louisiana for the purposes of jurisdiction based on diversity of citizenship.

3) The alleged general partners of Arkoma Associates and the states of their citizenship are as follows:

David Hepburn	-	Arizona
Dudley Merkel	-	Arizona
Richard Ledbetter	-	Oklahoma
Eldon Qualls	-	Oklahoma

4) This stipulation is in lieu of a formal amendment to the complaint insofar as it identifies the names and domiciles of the general partners.

Respectfully Submitted:

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NO. 86-817

In the Supreme Court of the United States

OCTOBER TERM, 1986

C. T. CARDEN, LEONARD L. LIMES, AND MAGEE DRILLING COMPANY,

Petitioners,

V.

ARKOMA ASSOCIATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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10 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

STATUTE:

OTHER:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986
No. 86-817

C. T. CARDEN, LEONARD L. LIMES, AND
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

This brief is respectfully submitted on behalf of respondent, Arkoma Associates (hereinafter "plaintiff") in opposition to the petition of petitioners C.T. Carden and Leonard L. Limes (hereinafter "defendants"), and Magee Drilling Company (hereinafter "intervenor") for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.[1]

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[1] The decision of the Court of Appeals in *Arkoma Associates v. C.T. Carden, et al.*, No. 86-9201, is set forth in full as Appendix "B" to petitioners' petition.

STATEMENT OF THE CASE

Plaintiff, Arkoma Associates, an Arizonia limited partnership, filed this action in the United States District Court for the Eastern District of Louisiana seeking a money judgment in the amount of $560,000 against defendants C.T. Carden and Leonard L. Limes as the guarantors of an equipment lease between plaintiff and Magee Drilling Company, an intervenor in this action.

Defendants moved to dismiss plaintiff's action for lack of diversity jurisdiction. Defendants C.T. Carden and Leonard L. Limes are both citizens of Louisiana. Of the four general partners of Arkoma Associates, two are citizens of Arizonia and two are citizens of Oklahoma. Of the forty-four limited partners of Arkoma Associates, only one is a citizen of Louisiana.

The district court denied defendants' motion, holding that diversity jurisdiction existed, but certifying the issue for interlocutory appeal pursuant to 28 U.S.C. §1292(b).[2] The Fifth Circuit Court of Appeals, however, denied defendants' petition for review of the district court's interlocutory order. Petitioners now petition this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

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[2] The decision of the United States District Court for the Eastern District of Louisiana in *Arkoma Associates v. C. Tom Carden, et al.*, No. 85-2295 (April 23, 1986), is set forth in full as Appendix "A" to petitioners' petition.

REASONS FOR DENYING THE WRIT

Petitioners seek review in this Court of the decision of the United States Court of Appeals for the Fifth Circuit not to permit an appeal of the interlocutory order of the district court denying defendants' motion to dismiss for lack of jurisdiction. While petitioners may feel that the district court's ruling was incorrect, they cannot appeal the decision of the court of appeals not to permit the appeal from the interlocutory order since final discretion to accept or reject appeals under 28 U.S.C. §1292(b) rests with the court of appeals. As was explained in the report of the Senate Judiciary Committee prior to the enactment of section 1292(b) in 1958:

> The granting of the appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari.
>
> It should be made clear that if application for an appeal from an interlocutory order is filed with the court of appeals, the court of appeals may deny such an application without specifying the grounds upon which such a denial is based. . . . But, whatever the reason, the ultimate determination concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals.

U.S. Code Congressional and Administrative News, 85th Cong., 2d Sess., pp. 5256-57 (1958).

This Court gave recognition to the principle that the final discretion to accept or reject the appeal of an interlocutory order under section 1292(b) rests exclusively

with the court of appeals in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), wherein it was stated that an appellate court may deny a section 1292(b) appeal for "any reason, including docket congestion." *Id.* at 475 (footnote omitted). Furthermore, as stated in *American Construction Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372 (1983), "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Id.* at 384. This is clearly not such a case.

In the absence of error in this case by the court of appeals, petitioners, in reality, seek review of the order of the trial judge denying their motion to dismiss. However, the order of the trial judge is an interlocutory order, not a final decree, a fact that of itself alone furnishes sufficient ground for the denial of the petition for writ of certiorari in this case. *See Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). As stated in *Cobbledick v. United States*, 309 U.S. 323 (1940):

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all.

Id. at 324-25 (footnotes omitted).

Accordingly, this Court has made it its normal practice to deny interlocutory review, *see Estelle v. Gamble*, 429 U.S. 97 (1976) (Stevens, J., dissenting), and there is no reason to deviate from that practicve in this case. Since

interlocutory orders are merged into the final judgment of a district court, they are appropriately reviewed on appeal from the final judgment of the trial court.

Finally, the decision of the district court on defendants' motion in this case does not conflict with the decision of this Court in *Navarro Savings Association v. Lee,* 446 U.S. 458 (1980). The issue presented in this case is whether the citizenship of a limited partnership is determined by reference to the citizenship of its general partners alone, or whether it is determined by reference to both the general and limited partners. As Justice Blackmun correctly noted in *Navarro,* this Court expressed no view on that issue in that case. *Id.* at 475 n.6 (Blackmun, J., dissenting). In *Navarro,* this Court addressed the related issue of how to determine the citizenship of the business trust organization. *Id.* at 458. This Court affirmed the "real party in interest" approach the Fifth Circuit Court of Appeals used in that case, and reaffirmed that only those persons who are real and substantial parties to the controversy will be considered in determining diversity jurisdiction. *Id.* at 460. Since the beneficial shareholders in *Navarro* retained only severely restricted powers of intervention and control, their citizenship was irrelevant, and the trustees were entitled to invoke the diversity jurisdiction of the federal court based on their own citizenship. *Id.* at 465-66.

While this Court did not explicitly extend the approach used in *Navarro* to the determination of federal diversity jurisdiction over cases in which a limited partnership is a party, the real party in interest test of *Navarro*

is equally appropriate in such cases. The trial court's application of that approach in the instant case does not conflict with this Court's decision in *Navarro.*

CONCLUSION

Petitioners have failed to show that the decision of the Fifth Circuit Court of Appeals to deny defendants' petition for a review of the interlocutory order of the district court was incorrect. This Court has traditionally refused to review the interlocutory orders of trial courts and should not make an exception in this case. Furthermore, the decisions of the district and appellate courts in this case do not conflict with the applicable decisions of this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: New Orleans, Louisiana
December 12, 1986

CERTIFICATE OF SERVICE

I hereby certify that three copies of Respondent's Brief in Opposition were served on all parties of record by depositing same in the United States mail, first-class postage prepaid and properly addressed to Richard K. Ingolia, Esq., Berke & Ingolia, 200 Oil & Gas Building, 1100 Tulane Avenue, New Orleans, Louisiana, 70112, this 12th day of December 1986.

/s/ MITCHELL J. HOFFMAN

NO. 86-817

In the Supreme Court of the United States

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C. T. CARDEN, LEONARD L. LIMES, AND MAGEE DRILLING COMPANY,
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V.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page

STATUTES:

IN THE
SUPREME COURT OF THE UNITED STATES
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versus

Arkoma Associates, et al,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

This brief is submitted by petitioners, C. T. Carden (hereinafter "Carden"), Leonard L. Limes (hereinafter "Limes"), and Magee Drilling Company (hereinafter collectively "Petitioners") in reply to the opposition brief of Arkoma Associates (hereinafter "Respondent").

It will be recalled that Petitioners seek review of the Fifth Circuit Court of Appeals (hereinafter "Fifth Circuit") decision to the effect that the citizenships of the general partners alone need be considered, and that of the limited partners of a limited partnership may be ignored, when

determining diversity jurisdiction pursuant to 28 USC 1332 (a).

Petitioners, Carden and Limes, are citizens of Louisiana as is Henry Stram, one of Respondent's limited partners. Petitioners contend that this identity of citizenship among opposing parties destroys diversity jurisdiction. This contention is supported by the decision of this Court in *Navarrao Savings Association v. Lee,* 466 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d. 425 (S. Ct. 1980); the decisions of the Third Circuit in *Carlsberg Resources Corporation v. Cambria Savings & Loan Association,* 554 F 2d 1254 (3rd Cir. 1977) and *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia,* 657 F 2d 29 (3rd Cir. 1981); of the Fourth Circuit in *New York State Teachers Retirement System v. Kalkus,* 764 F 2d 1015 (4th Cir. 1985); and of the Seventh Circuit in *Elston Investments, Ltd. v. David Alteman Leasing Corporation,* 731 F 2d 436 (7th Cir. 1984).

The Second Circuit and Fifth Circuit, on the contrary, hold that only the citizenships of the general partners of a limited partnership need be considered when determining diversity jurisdiction, e g. *Lee v. Navarro Savings Association,* 597 F 2d 421 (5th Cir. 1979); *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation,* 797 F 2d 238 (5th Cir. 1986); and *Colonial Realty Corporation v. Bache & Company,* 358 F 2d 178 (2nd Cir. 1966).

Respondent does not address the foregoing conflict in the decisions of the various circuits, but urges this Court to deny certiorari because, it contends, the Court of Appeals' decision not to review a matter certified to it under 28 U.S.C. 1292(b) is itself not reviewable.

Respondent errs on two counts: (1) The Fifth Circuit did not refuse to review the district court's judgment as Respondent suggests. Rather, the Fifth Circuit decided the issue by holding that its decision in the companion case of *Mesa Operating Limited Partnership,* supra, was dispositive of the jurisdiction issue. Therefore, the appeal at hand would not "materially advance the ultimate termination of the litigation" as required by 28 U.S.C. 1292(b) because such an appeal would fail. (See the Fifth Circuit opinion attached to Petitioners' original application as Appendix "B"); and (2) although the general rule is that an interlocutory plea in abatement is not reviewable, a well recognized exception exists when the plea is one dealing with the jurisdiction of the court.

28 U.S.C. 2105 (hereinafter "Section 2105") states:

> "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement *which do not involve jurisdiction.*"

(Emphasis added) *Section 2105* was interpreted by this Court in *Snyder v. Buck,* 340 U. S. 15, 71 S. Ct. 93, 95 L. Ed. 15 (S. Ct. 1950) in which Snyder successfully sought to obtain certain benefits from Buck as paymaster general of the Navy in the trial court. Buck retired and was replaced by another officer, but an appeal was perfected in Buck's name after retirement. The court of appeals ordered the case dismissed because, upon Buck's retirement, the case abated. The Supreme Court affirmed the court of appeals but in doing so found that the high court had authority to hear the appeal in that the absence of a necessary party was a matter of jurisdiction, to wit:

> "Nor is there any barrier to our review of this ruling on abatement by 28 U. S. C. 2105, 28 U.S.C.A. 2105, which prohibits a reversal by the Court of Appeals or this Court for error in ruling upon matters in abatement "which do not involve jurisdiction." The absence of a necessary party and the statutory barrier to substitution go to jurisdiction."

In the earlier case of *Goldey v. The Morning News,* 156 U.S. 518, 15 S. Ct. 59, 39 L. Ed. 517 (S. Ct. 1895), this Court held that it had appellate jurisdiction to review a judgment dismissing the case below on a plea in abatement because such plea went to the question of jurisdiction. So holding, the Court stated:

> "The defendant in error has interposed a preliminary objection that the judgment of the circuit court upon this question cannot be reviewed, because of the provision of the statutes, that there shall be no reversal in this court upon a writ of error "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court" . . .But that provision, which has been part of the judiciary acts of the United States from the beginning, has never been, and in our opinion should not be construed as forbidding the review of a decision, even on a plea in abatement, of any question of the jurisdiction of the court below to render judgment against the defendant . . ."

It is clear, therefore, that Respondent is in error in its contention that this Court may not grant certiorari to review a judgment rendered below on a motion to dismiss for lack of diversity jurisdiction.

CONCLUSION

This Court should grant certiorari, reverse the Fifth Circuit Court of Appeals, and dismiss this action for lack of diversity jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Reply Brief of Petitioners have been served on Mitchell J. Hoffman, attorney for Respondent by depositing same in the United States Mail, postage prepaid properly addressed to Mitchell J. Hoffman, 21st Floor Pan American Life Center, 601 Poydras Street, New Orleans, Louisiana 70130.

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